

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,	)	NO. CR 11-50174-TUC-RCC (BPV)
Plaintiff,	)	
vs.	)	<b>REPORT AND RECOMMENDATION</b>
Jose Aguilar-Martinez,	)	
Defendant.	)	
<hr/>		

On July 21, 2011, a Petition to Revoke Supervised Release was filed alleging the defendant violated his supervised release when he committed “another federal state or local crime” by violating 8 U.S.C. § 1326. (Doc. 4) Evidence supporting the alleged violation consists of records confirming the Defendant’s deportation on May 5, 2011, and records verifying he entered, attempted to enter, or was found in the United States without authorization on May 18, 2011, when he was arrested by immigration officials near Why, Arizona.<sup>1</sup> (*Id.*)

On August 16, 2011, Defendant filed a motion to dismiss the petition to revoke supervised release, pursuant to the Due Process Clause of the Fifth Amendment, as well as 18 U.S.C. §§ 3583 and 3603. (Doc. 9) The Government did not file a response in opposition. A supplemental exhibit was filed on September 23, 2011. (Doc. 13)

The matter came on for hearing before the Court on September 26, 2011. The Court,

---

<sup>1</sup>Defendant has since entered a plea and been found guilty of illegal re-entry after deportation in CR 11-2100-TUC-RCC.

1 having considered the briefing and arguments of the parties, recommends that the District  
2 Judge, after independent review and consideration, enter an order **DENYING** Defendant's  
3 Motion to Dismiss.

#### 4 FACTS

5 The facts are essentially uncontested. Defendant Aguilar-Martinez was convicted in  
6 United States District Court for the District of Wyoming on September 8, 2010 of illegal  
7 re-entry of a previously deported alien, a violation of 8 U.S.C. § 1326(a)(1) and (2). The  
8 court imposed a term of imprisonment of twelve (12) months and one (day). The amended  
9 judgment issued by the Court imposed the following conditional term regarding supervised  
10 release: "Upon release from imprisonment, the defendant shall be on supervised release for  
11 a term of three (3) years, **if not immediately deported.**" *Id.* at 3. The amended judgment  
12 further advised Defendant that while on supervised release "the defendant shall not commit  
13 another federal, state or local crime."

14 Upon release from custody on May 3, 2011, the parties agreed during the evidentiary  
15 hearing that Defendant was immediately deported on May 5, 2011.

16 Unlike the judgment, the transcript of the proceedings was unequivocal. The District  
17 Court stated that "[O]n release from imprisonment, you **shall be** placed on supervised release  
18 for a term of three years." (Reporter's Transcript, Sentencing Proceedings District of  
19 Wyoming, 9/8/2010, at 9) Defendant was further advised that "on supervised release you  
20 shall abide by these conditions: You shall not commit any other crimes, federal, state or  
21 local." (*Id.*)

#### 22 DISCUSSION

23 Defendant contends that if it was the intent of the District Court to consider Defendant  
24 on supervised release under the present circumstances, holding him to answer based on the  
25 conditional, ambiguously worded judgment would violate his right to due process and the  
26 statutory requirements of 18 U.S.C. §§ 3583 and 3603.

27 Defendant received oral notice of the conditions of his supervised release at his  
28 sentencing hearing. Such notice is sufficient for purposes of the statutory requirements of 18

1 U.S.C. §§ 3583(f) and 3603(1). *See United States v. Ortega-Brito*, 311 F.3d 1136 (9<sup>th</sup> Cir.  
2 2002); *See also United States v. Tapia-Marquez*, 361 F.3d 535, 536 (9<sup>th</sup> Cir. 2004); *United*  
3 *States v. Botello-Quinones*, 2007 WL 9741110 (D.Ariz) (unpublished disposition); *United*  
4 *States v. Meneely*, 2007 WL 1470962 (S.D. Cal.)

5 Furthermore, the oral pronouncement is unambiguous and it is the oral pronouncement  
6 at sentencing that controls the disposition of this matter. *See United States v. Allen*, 157 F.3d  
7 661, 668 (9<sup>th</sup> Cir. 1998) (“In cases where there is a direct conflict between an unambiguous  
8 oral pronouncement of sentence and the written judgment and commitment, this [c]ourt has  
9 uniformly held that the oral pronouncement, as correctly reported, must control. The only  
10 sentence that is legally cognizable is the actual oral pronouncement in the presence of the  
11 defendant.”)(citing *United States v. Hicks*, 997 F.2d 594, 597 (9th Cir.1993)(quoting *United*  
12 *States v. Munoz-Dela Rosa*, 495 F.2d 253, 256 (9th Cir.1974))).


13 Accordingly, the Magistrate Judge concludes that there was no due process violation  
14 because Defendant received actual notice orally that he would be placed on supervised  
15 release, and that he received actual notice that one of the conditions of the term of supervised  
16 release was that he not violate any federal, state or local law.

#### 17 RECOMMENDATION

18 The Magistrate Judge recommends the District Court, after independent review,  
19 DENY Defendant’s Motion to Dismiss Petition to Revoke Supervised Release. (Doc. 9).

20 Pursuant to Federal Rule of Criminal Procedure 59(b)(2), any party may serve and file  
21 written objections within fourteen days of being served with a copy of the Report and  
22 Recommendation. If objections are not timely filed, they may be deemed waived. The parties  
23 are advised that any objections filed are to be identified with the following case number: **CR**  
24 **11-50174-TUC-RCC.**

25 DATED this 6<sup>th</sup> day of December, 2011.

26  
27  
28   
Glenda E. Edmonds  
United States Magistrate Judge